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HOUSE BILL 655

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

John A. Heaton

FOR THE RADIOACTIVE AND HAZARDOUS MATERIALS COMMITTEE

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING THE AIR QUALITY CONTROL
ACT TO PROVIDE FOR APPEALS BASED ON THE RECORD OF A PUBLIC
HEARING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 74-2-7 NMSA 1978 (being Laws 1972,
Chapter 51, Section 4, as amended) is amended to read:

"74-2-7. PERMITS--PERMIT APPEALS TO THE ENVIRONMENTAL
IMPROVEMENT BOARD OR THE LOCAL BOARD--PERMIT FEES.--

A. By regulation, the environmental improvement
board or the local board shall require:

(1) a person intending to construct or modify
any source, except as otherwise specifically provided by
regulation, to obtain a construction permit from the department
or the local agency prior to such construction or modification;

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1 and

2 (2) a person intending to operate any source
3 for which an operating permit is required by the 1990
4 amendments to the federal act, except as otherwise specifically
5 provided by regulation, to obtain an operating permit from the
6 department or the local agency.

7 B. Regulations adopted by the environmental
8 improvement board or the local board shall include at least the
9 following provisions:

10 (1) requirements for the submission of
11 relevant information, including information the department or
12 the local agency deems necessary to determine that regulations
13 and standards under the Air Quality Control Act or the federal
14 act will not be violated;

15 (2) specification of the deadlines for
16 processing permit applications; provided the deadline for a
17 final decision by the department or the local agency on a
18 construction permit application may not exceed:

19 (a) ninety days after the application is
20 determined to be administratively complete, if the application
21 is not subject to requirements for prevention of significant
22 deterioration, unless the secretary or the director grants an
23 extension not to exceed ninety days for good cause, including
24 the need to have public hearings; or

25 (b) one hundred eighty days after the

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1 application is determined to be administratively complete, if
2 the application is subject to requirements for prevention of
3 significant deterioration, unless the secretary or the director
4 grants an extension not to exceed ninety days for good cause,
5 including the need to have public hearings;

6 (3) ~~[that]~~ if the department or local agency
7 fails to take final action on a construction permit application
8 within the deadlines specified in Paragraph (2) of this
9 subsection, the department or local agency shall notify the
10 applicant in writing that an extension of time is required to
11 process the application and specify in detail the grounds for
12 the extension;

13 (4) a description of elements required before
14 the department or local agency shall deem an application
15 administratively complete;

16 (5) specification of the public notice and
17 comment period ~~[and public hearing, if any]~~ on the application
18 or draft permit required prior to the issuance of a permit;
19 provided that the permit regulations adopted:

20 (a) by the environmental improvement
21 board shall include provisions governing notice to nearby
22 states; and

23 (b) by any local board shall include
24 provisions requiring that notice be given to the department of
25 all permit applications by any source that emits, or has a

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1 potential emission rate of, one hundred tons per year or more
2 of any regulated air contaminant, including any source of
3 fugitive emissions of each regulated air contaminant, at least
4 sixty days prior to the date on which construction or major
5 modification is to commence;

6 (6) an opportunity for a public hearing at
7 which all interested persons shall be given a reasonable
8 opportunity to submit evidence, data, views or arguments orally
9 and in writing on the application or draft permit;

10 [~~(6)~~] (7) a schedule of construction permit
11 fees sufficient to cover the reasonable costs of:

12 (a) reviewing and acting upon any
13 application for such permit; and

14 (b) implementing and enforcing the terms
15 and conditions of the permit, excluding any court costs or
16 other costs associated with an enforcement action;

17 [~~(7)~~] (8) a schedule of emission fees
18 consistent with the provisions of Section 502(b)(3) of the 1990
19 amendments to the federal act;

20 [~~(8)~~] (9) a method for accelerated permit
21 processing that may be requested at the sole discretion of the
22 applicant at the time the applicant submits a construction
23 permit application and that:

24 (a) allows the department or local
25 agency to contract with qualified outside firms to assist the

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1 department or local agency in its accelerated review of the
2 construction permit application; provided that the department
3 or local agency can contract with a qualified firm that does
4 not have a conflict of interest; and

5 (b) establishes a process for the
6 department or local agency to account for the expenditure of
7 the accelerated permit processing fees;

8 [~~(9)~~] (10) allowance for additional permit
9 application fees, sufficient to cover the reasonable costs of
10 an accelerated permit application review process. Before the
11 applicant is notified that the permit application has been
12 determined to be complete, the department or local agency shall
13 give the applicant a reasonable estimate of costs of an
14 accelerated permit application review process;

15 [~~(10)~~] (11) specification of the maximum
16 length of time for which a permit shall be valid; provided that
17 for an operating permit such period may not exceed five years;
18 and

19 [~~(11)~~] (12) for an operating permit only:

20 (a) provisions consistent with Sections
21 502(b) and 505(b) of the federal act providing: 1) notice to
22 and review and comment by the United States environmental
23 protection agency; and 2) that if the department or local
24 agency receives notice of objection from the United States
25 environmental protection agency before the operating permit is

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1 issued, the department or the local agency shall not issue the
2 permit unless it is revised and issued under Section 505(c) of
3 the federal act;

4 (b) provisions governing renewal of the
5 operating permit; and

6 (c) specification of the conditions
7 under which the operating permit may be terminated, modified or
8 revoked and reissued prior to the expiration of the term of the
9 operating permit.

10 C. The department or the local agency may deny any
11 application for:

12 (1) a construction permit if it appears that
13 the construction or modification:

14 (a) will not meet applicable standards,
15 rules or requirements of the Air Quality Control Act or the
16 federal act;

17 (b) will cause or contribute to air
18 contaminant levels in excess of a national or state standard
19 or, within the boundaries of a local authority, applicable
20 local ambient air quality standards; or

21 (c) will violate any other provision of
22 the Air Quality Control Act or the federal act; and

23 (2) an operating permit if the source will not
24 meet the applicable standards, rules or requirements pursuant
25 to the Air Quality Control Act or the federal act.

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1 D. The department or the local agency may specify
2 conditions to any permit granted under this section, including:

3 (1) for a construction permit:

4 (a) a requirement that such source
5 install and operate control technology, determined on a case-
6 by-case basis, sufficient to meet the standards, rules and
7 requirements of the Air Quality Control Act and the federal
8 act;

9 (b) individual emission limits,
10 determined on a case-by-case basis, but only as restrictive as
11 necessary to meet the requirements of the Air Quality Control
12 Act and the federal act or the emission rate specified in the
13 permit application, whichever is more stringent;

14 (c) compliance with applicable federal
15 standards of performance;

16 (d) reasonable restrictions and
17 limitations not relating to emission limits or emission rates;
18 or

19 (e) any combination of the conditions
20 listed in this paragraph; and

21 (2) for an operating permit, terms and
22 conditions sufficient to ensure compliance with the applicable
23 standards, rules and requirements pursuant to the Air Quality
24 Control Act and the federal act.

25 E. This section does not authorize the department

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1 or the local agency to require the use of machinery, devices or
2 equipment from a particular manufacturer if the federal
3 standards of performance, state regulations and permit
4 conditions may be met by machinery, devices or equipment
5 otherwise available.

6 F. The issuance of a permit does not relieve any
7 person from the responsibility of complying with the provisions
8 of the Air Quality Control Act and any applicable regulations
9 of the environmental improvement board or the local board. Any
10 conditions placed upon a permit by the department or the local
11 agency shall be enforceable to the same extent as a regulation
12 of its board.

13 G. A person who participated in a permitting action
14 before the department or the local agency shall be notified by
15 the department or the local agency of the action taken and the
16 reasons for the action. Notification of the applicant shall be
17 by certified mail.

18 H. A person who participated in a permitting action
19 before the department or the local agency and who is adversely
20 affected by such permitting action may file a petition for
21 [hearing] review before the environmental improvement board or
22 the local board. The petition shall be made in writing to the
23 environmental improvement board or the local board within
24 thirty days from the date notice is given of the department's
25 or the local agency's action and shall include a statement of

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1 the issues to be raised and the relief sought. Unless a timely
2 petition for [hearing] review is made, the decision of the
3 department or the local agency shall be final and not subject
4 to judicial review.

5 I. If a timely petition for [hearing] review is
6 made, the environmental improvement board or the local board
7 shall [~~hold a hearing~~] consider the petition within sixty days
8 after receipt of the petition. The environmental improvement
9 board or the local board shall notify the petitioner and the
10 applicant or permittee, if other than the petitioner, by
11 certified mail of the date, time and place of the [hearing]
12 review. If the subject of the petition is a permitting action
13 deemed by the environmental improvement board or the local
14 board to substantially affect the public interest, the
15 environmental improvement board or the local board shall ensure
16 that the public receives notice of the date, time and place of
17 the [hearing. ~~The public in such circumstances shall also be~~
18 ~~given a reasonable opportunity to submit data, views or~~
19 ~~arguments orally or in writing and to examine witnesses~~
20 ~~testifying at the hearing. Any person submitting data, views~~
21 ~~or arguments orally or in writing shall be subject to~~
22 ~~examination at the hearing] review.~~

23 J. For review by the environmental improvement
24 board, [or] the board shall review the record compiled before
25 the department, including the transcript of any public hearing

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1 held on the application or draft permit, and shall allow any
2 party to submit arguments. The board may designate a hearing
3 officer to review the record and the arguments of the parties
4 and recommend a decision to the board. The board shall
5 consider and weigh only the evidence contained in the record
6 before the department and the recommended decision of the
7 hearing officer, if any, and shall not be bound by the factual
8 findings or legal conclusions of the department. Based on the
9 review of the evidence, the arguments of the parties and the
10 recommendation of the hearing officer, if any, the board shall
11 sustain, modify or reverse the action of the department.

12 K. Prior to the date set for review, if a party
13 shows to the satisfaction of the board that there was no
14 opportunity to submit comment or evidence on an issue being
15 challenged, the board shall order that the additional comment
16 or evidence be taken by the department. Based on the
17 additional evidence, the department may revise the decision and
18 shall promptly file with the board the additional evidence
19 received and the action taken.

20 L. For review by the local board, the board shall
21 hold a hearing on the petition. The local board may designate
22 a hearing officer to take evidence in the hearing. All
23 hearings shall be recorded. [K-] The burden of proof shall be
24 upon the petitioner. Based upon the evidence presented at the
25 hearing, [the environmental improvement board or] the local

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1 board shall sustain, modify or reverse the action of the
2 [~~department or the~~] local agency [~~respectively~~].

3 M. The environmental improvement board or the local
4 board shall notify the petitioner and all other parties to the
5 proceeding of the decision and the reasons for it.

6 [~~E.~~] N. Notwithstanding any other provision of law
7 and subject to the provisions of Section 74-2-4 NMSA 1978, a
8 final decision on a permit by the department, the environmental
9 improvement board, the local agency, the local board or the
10 court of appeals that a source will or will not meet applicable
11 local, state and federal air pollution standards and
12 regulations shall be conclusive and is binding on every other
13 state agency and as an issue before any other state agency
14 shall be deemed resolved in accordance with that final
15 decision.

16 [~~M.~~] O. Subject to the provisions of Section 74-2-4
17 NMSA 1978, if the local board has adopted a permit regulation
18 pursuant to this section, persons constructing or modifying any
19 source within the boundaries of the local authority shall
20 obtain a permit from the local agency and not from the
21 department.

22 [~~N.~~] P. Fees collected pursuant to this section
23 shall be deposited in:

24 (1) the state air quality permit fund created
25 by Section 74-2-15 NMSA 1978 if collected by the department; or

. 142290. 2

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1 (2) a fund created pursuant to Section
2 74-2-16 NMSA 1978 if collected by a local agency pursuant to a
3 permit regulation adopted by the local board pursuant to this
4 section. "

5 Section 2. Section 74-2-9 NMSA 1978 (being Laws 1971,
6 Chapter 57, Section 1, as amended) is amended to read:

7 "74-2-9. JUDICIAL REVIEW- ADMINISTRATIVE ACTIONS. --

8 A. Any person adversely affected by an
9 administrative action taken by the environmental improvement
10 board, the local board, the secretary or the director, other
11 than the adoption of a regulation, may appeal to the district
12 court [of appeals] pursuant to the provisions of Section
13 39-3-1.1 NMSA 1978. All appeals shall be upon the record made
14 at the hearing and shall be taken to the district court [of
15 appeals] within thirty days following the date of the action.

16 B. [~~For appeals of regulations, the date of the~~
17 ~~action shall be the date]~~ A person who is or may be adversely
18 affected by a regulation adopted by the environmental
19 improvement board or the local board may appeal the regulation
20 by filing a notice of appeal with the court of appeals within
21 thirty days of the filing of the regulation by the
22 environmental improvement board or the local board pursuant to
23 the State Rules Act.

24 C. Upon appeal, the court of appeals shall set
25 aside the [~~action]~~ regulation only if found to be:

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- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

D. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

(1) by the environmental improvement board, the local board, the ~~[department]~~ secretary or the ~~[local agency]~~ director, whichever took the action being appealed; or

(2) by the court ~~[of appeals]~~ if the environmental improvement board, the local board, the ~~[department]~~ secretary or the ~~[local agency]~~ director denies a stay or fails to act upon an application for a stay within ~~[sixty]~~ thirty days after receipt of the application. "